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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 305.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET ALS.

MOTION AND BRIEF FOR DEFENDANTS.

F. P. B. SANDS,
WM. A. MILLIKEN,
Solicitors for Defendants in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 305.

MARY LOUISE KENADAY, EXECUTRIX,
PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET AL. } *ss:*

Defendants, Arabella D. Sinnott and others, by their solicitors of record, move to dismiss the appeal granted in this cause by Chief Justice Alvey of the Court of Appeals of the District of Columbia, on April 18, 1899, from a decree of said court entered herein on April 5, 1899, upon the ground that the order granting said appeal is void, the cause having been transferred seven (7) days before the granting of said order to this honorable court by writ of error sued out by plaintiff and filed with the clerk of the Court of Appeals on April 11, 1899, and bond for supersedeas under said writ having been filed and approved by Chief Justice Alvey on April 14, 1899, five (5) days before granting said order for appeal.

Defendants, by their solicitors of record, move to dismiss the writ of error in this cause, issued and filed April 11

1899, to the decree of the Court of Appeals entered in this cause on April 5, 1899, upon two grounds:

First. Because a writ of error will not lie to a decree in a proceeding of this character, this not being a judgment at law, but a decree in a proceeding in the nature of an equity proceeding for the settlement of the final account of an executrix in the orphans' court for the District of Columbia.

Second. Because plaintiff in error is not entitled to have this decree of the Court of Appeals reviewed by this honorable court by writ of error or by appeal, this decree being simply a decree confirming a final account of the executrix, as restated by the orphans' court of the District of Columbia under a mandate from the Court of Appeals issued January 20, 1899, upon a *former final decree* rendered by said court on January 3, 1899, on a former appeal in this cause, and from which former decree no appeal was taken by either party to the proceedings.

Defendants, by their solicitors of record, move to affirm this decree of the Court of Appeals of April 5, 1899, under rule 6, paragraph 5, of the rules of the supreme court, on the ground that the writ of error and appeal in this cause were taken for delay only, and ask that under rule 23, paragraph 2, of the rules of the supreme court they be allowed damages at the rate of ten (10) per cent., in addition to interest, upon the decree below.

WM. A. MILLIKEN,
F. P. B. SANDS,
Solicitors for Defendants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1899.

No. 305.

MARY LOUISE KENADAY, EXECUTRIX, PLAINTIFF IN ERROR AND APPELLANT,

vs.

ARABELLA D. SINNOTT ET ALS.

Brief for Defendants on Motion to Dismiss Appeal and Writ of Error.

STATEMENT OF CASE.

This is a proceeding for the settlement of the final account of an executrix in the supreme court for the District of Columbia, holding a special term for orphans' court business. This record shows that Alexander M. Kenaday died in this District March 25, 1897, leaving a will, which was probated in the orphans' court of the District at the April term, 1897, and the plaintiff in error, Mary Louise Kenaday, was at that term appointed and qualified as executrix, entering into bond in the sum of *forty-five thousand dollars* for the faithful discharge of her duties.

See Record, pages 1 to 5.

On June 10, 1898, under the order of the orphans' court, the executrix gave notice fixing Friday, July 8, 1898, as the day for the settlement of her final account as executrix in the orphans' court and for making distribution of said estate under the orders of said court.

See Record, page 4.

In pursuance of said notice, defendants in error appeared and filed their petition in said court setting up their claim as the next of kin of the decedent, Alexander M. Kenaday, as well as legatees under his will.

See Record, page 5.

The final account of the executrix was made up and filed July 15, 1898, showing that she had received $36,454.85 belonging to the estate, and that she had paid out to legatees under the will and for expenses of administration, including a commission of *ten per cent.* to herself as executrix, the sum of $27,236.09, leaving a balance in her hands which had not been disposed of by the will of $9,218.76. This fund was in United States 4 per cent. registered bonds.

See Record, pages 7, 8.

The executrix claimed this balance of $9,218.76 in United States bonds as being included in a bequest to her by the will, and took credit for same in her account, and thus balanced and closed the account in full.

See Account, bottom of Record, page 8.

Defendants in error claimed this balance of $9,218.76 as next of kin of decedent upon the ground that it had not been included in any bequest in the will, but was a residue of the estate, and therefore necessarily belonged to them as next of kin, there being no residuary clause in the will.

They therefore filed their exceptions to the account, as

stated, by the executrix crediting herself with this item. There were some other minor exceptions to the account not now necessary to refer to. The orphans' court, Justice Hagner, presiding, on October 11, 1898, overruled the exceptions of defendants and approved the final account of the executrix as stated, giving to her this $9,218.76, being the entire balance of said estate. Defendants, on October 13, 1898, appealed from this order approving said final account to the Court of Appeals for the District of Columbia.

See Record, pages 12, 13.

At the January term, 1899, of the Court of Appeals this cause was heard, and the order of Hagner, justice, holding the orphans' court, was reversed with costs. The item of $9,218.76 was decreed to belong to defendants, and the cause was remanded to the orphans' court, with directions that the final account of the executrix be restated in accordance with the principles of the opinion of the Court of Appeals.

See Record, pages 13, 14.

Chief Justice Alvey delivered an able and exhaustive opinion in the case settling and fixing the rights of all the parties, and deciding that the entire balance of the estate, amounting to $9,218.76, as shown by said final account, did not pass under the will to the executrix, but was a residue of the estate not disposed of by the will and belonged to defendants as next of kin.

For some unexplainable reason we find upon examining this record that the plaintiff in error has not made this opinion of the Court of Appeals a part of this record, nor has the clerk of the Court of Appeals sent up a copy of same, as he is specially required to do by the rules of this honorable court. It is reported, however, in 14 Dis. Court of Appeals Rep'ts, page 1, and we respectfully refer to same.

No appeal was taken from that decree of the Court of

Appeals by either party, and in consequence, at the end of twenty (20) days, under the rules of practice of that court, the mandate was issued to the orphans' court to proceed with the execution of the decree of the Court of Appeals.

See Record, pages 13, 14.

In pursuance of this mandate, Justice Bradley, holding the orphans' court, caused said account of the executrix to be restated, as directed by the Court of Appeals, and approved same February 10, 1899.

See Record, pages 17, 18.

Upon the restating of said account the distributive share found to belong to Arabella D. Sinnott, amounting to $4,142.82, was directed by said court to be paid over to her. The balance of said fund was to await proof of death of Henry C. Piles, one of the distributees, before further action.

To this account, as restated, the executrix excepted and raised all the questions which had been heard and determined on the former hearing of the cause, and by a *second appeal* she carried the cause again to the Court of Appeals.

See Record, pages 19, 20.

The cause was for the *second time* heard by the Court of Appeals upon motion of defendants in error to dismiss and affirm, and the court on April 5, 1899, decreed that the final order of the orphans' court of February 10, 1899, approving the restated account, be affirmed, "the said account "appearing to be restated in accordance with the mandate of "this court issued on the former appeal."

See Record, page 25.

On April 11, 1899, the executrix, plaintiff in error, sued out a writ of error to said *second* decree of the Court of Appeals and removed the cause to this honorable court.

See Record, page 26.

On April 14, 1899, the bond for supersedeas on the writ of error was filed and approved by the court.

See Record, pages 29, 30.

The plaintiff in error (as she states in her petition for an appeal) not being properly advised as to whether her writ of error was the proper proceeding, did, on April 17, 1899, apply by an *ex parte* petition to Chief Justice Alvey for an appeal in this cause to this honorable court, and the chief justice did, on April 18, 1899, sign an order allowing an appeal on the ground, as stated in the order, that "it appearing to the court that the practice in cases exactly of "the character of the present one has not been established "by precedent," &c.

See Record, page 28.

Defendants in error have now entered their motion in this court to dismiss the appeal in this cause, and to dismiss the writ of error, and, under rule 6, paragraph 5, of the rules of this honorable court, have joined with their motion to dismiss a motion to affirm the decree of the Court of Appeals on the ground that this writ of error and appeal were taken for delay only, and for ten per cent. damages and interest under rule 23, paragraph 2, of the rules of this honorable court.

Argument.

First. Motion to Dismiss the Appeal.—We move to dismiss the appeal upon the ground that the *ex parte* order of Chief Justice Alvey on April 18, 1899, allowing the appeal, is void, the cause having been removed to this honorable court by the writ of error seven (7) days before, to wit, on April 11, 1899. The Court of Appeals had lost all jurisdiction over the case, and could not make any order therein.

Second. Motion to Dismiss Writ of Error.—We move to dismiss the writ of error on two grounds: *First*, because a writ of error will issue *only* to a judgment at law. This is not a judgment at law, but a decree in equity. The orphans' court, in matters of administration and settling accounts of administrators and executors, is acting as a court of equity, and its proceedings are in the nature of proceedings in equity. A decree of the orphans' court approving an executor's account is not a *judgment* at law, and therefore it cannot be reviewed on a writ of error, but only by an appeal. The plaintiff in error so considered it, and the Court of Appeals so considered it, because the case was carried by *appeal* from the orphans' court to the Court of Appeals. We submit, therefore, that the writ of error will not lie in this case.

The *second* ground of our motion is that the executrix is not entitled to have *this decree* of the Court of Appeals reviewed by this honorable court either by writ of error or appeal or in any other way. She is estopped by the former decree of the Court of Appeals rendered in this cause on January 3, 1899, on the *first appeal*, from which she did not appeal nor seek to have same reviewed or set aside by writ of error or in any way, but she acquiesced in same and allowed the cause to be remanded by the Court of Appeals to the orphans' court, and the decree to be there carried into effect, and the account to be restated in accordance with the directions of the Court of Appeals. She cannot, therefore, be now heard on any questions decided by that former decree. She had her day in court below and in the Court of Appeals, and having lost her case, she cannot again have same tried *de novo* in this court. Every question assigned as an error by her was decided on the former appeal and is *res adjudicata*.

The only thing the Court of Appeals decided on this last appeal is that the account of the executrix had been properly restated by the orphans' court in accordance with the opinion

of the Court of Appeals on the former appeal, and therefore the order approving same is affirmed. A writ of error, if it would lie, or an appeal from this last decree of the Court of Appeals would bring up for review nothing but this decree and the proceedings in the orphans' court subsequent to the former decree.

That former decree was a *complete* and *final* decree, settling and fixing the rights of the parties to this fund in dispute. (See opinion by Chief Justice Alvey, 14 Dis. Court of Appeals Rpts., page 1.) Under that decree and the mandate of the Court of Appeals, the orphans' court had no discretion in the restating of the account. It could exercise no *judicial* power in the case. It simply performed a mere clerical or ministerial duty by restating the account as the Court of Appeals directed. It simply carried into effect the decree of the Court of Appeals.

The authorities all agree that where a superior court renders a decree fixing the liability and rights of parties and remands the case to a subordinate court for a *judicial* purpose, upon which a further decree is to be entered, it is not a *final decree.*

Cal. Nat. Bank *vs.* Stateler, 171 U. S., 447.

But where the case is remanded to the lower court for a *ministerial purpose only*, in order to carry out the decree of the superior court, such a decree is *final* and *conclusive* of the case.

McGourkey *vs.* T. & O. R. R.; 146 U. S., 537.
Mower *vs.* Fletcher, 114 U. S., 127.

The whole question, whether a decree is final or not, hinges on the point whether the reference to a master or the mandate to the court below is for a *judicial purpose* or a

mere *ministerial purpose.* All the cases recognize this distinction. We cite a number of them.

Whiting *vs.* Bank, 13 Pet., 6.
Winthrop Iron Co. *vs.* Meeker, 109 U. S., 180.
Ex parte Norton, 108 U. S., 237.
Blossom *vs.* Railroad, 1 Wall., 65.
Railroad *vs.* Bradley, 7 Wall., 577.
Thompson *vs.* Dean, 7 Wall., 342.
French *vs.* Shoemaker, 12 Wall., 86.

We respectfully refer also to—
93 U. S., 108.
18 Wall., 628.
19 Wall., 283.
23 Wall., 405–420.

Nothing can be clearer than that former opinion and decree of the Court of Appeals. An examination of it shows every question now sought to be raised by plaintiff in her assignment of errors was raised on that trial and decided by that opinion. The account that had been approved by Hagner, justice, was a final account and complete settlement of the estate by the executrix. Had Justice Hagner's opinion been sustained by the Court of Appeals, that would have ended the litigation and closed the settlement of the estate, unless defendants had appealed to this honorable court. If it was a final account and settlement as to us, it must of necessity be the same as to the plaintiff in error.

The authorities are numerous and unanimous to the effect that on a *second appeal* all questions settled on a former appeal are *res adjudicata.*

Second appeals or writs of error will lie in certain cases where it is alleged that the mandate of the appellate court *has not been* properly executed; but the appeal or writ of error in such case will bring up nothing for re-examination *except the proceedings subsequent to the mandate.* Needful ex-

planations may be derived from the original record, but the re-examination cannot extend to anything that was decided on the antecedent appeal or writ of error.

The Lady Pike, 96 U. S., 461.
Supervisors *vs.* Kennicott, 94 U. S., 498.
Huckley *vs.* Morton, 103 U. S., 764.
Ames *vs.* Quinby, 106 U. S., 384.
Clark *vs.* Keith, 106 U. S., 464.

Indeed the circuit courts of appeals have held in numerous cases that an appeal should not be entertained from a decree of a circuit court rendered pursuant to a mandate of the court of appeals *when no errors are assigned as to matters arising subsequent to the mandate.*

Gregory *vs.* Pike, 77 Fed. Rpt., 241.
Gregory *vs.* Pike, 23 C. C. A., 138.
In re Pike, 76 Fed. Rpt., 400.
In re Pike, 22 C. C. A., 244.

This honorable court has also laid down the principle that no appeal or writ of error will be allowed from a decree entered by a lower court in accordance with a mandate of a superior court.

See Humphreys *vs.* Baker, 103 U. S., 736.
Stewart *vs.* Salamon, 97 U. S., 361.

In above-cited case of Humphreys *vs.* Baker, Chief Justice Waite says:

"We have decided that we would not entertain an appeal from a decree entered in exact accordance with our mandate on a former appeal, and that when such an appeal was taken, we would, on application, examine the decree and if it conformed to the mandate, dismiss the case with costs."

Relying upon these authorities, we have made this motion to dismiss this writ of error. We have under rule

6, paragraph 5, of the rules of this honorable court joined with this motion to dismiss a motion to affirm, on the ground that this writ of error and appeal were taken for *delay only*. The manifest purpose to delay this cause in every way possible is shown by this record. The *flimsy pretext* under which the executrix has set up claim to the fund in her hands belonging to defendants shows the force of our charge that the whole spirit of this litigation has been to prevent defendants from receiving their money to the very last moment possible and delay justice. The Court of Appeals, in rendering the opinion on the former trial of this case, used the expression that the position under which the executrix sought to withhold this fund from defendants "was not the law and never was the law in America."

The further fact that when the Court of Appeals rendered its opinion January 3, 1899, plaintiff in error did not except to same or seek to have same reviewed then, either by appeal or writ of error, but allowed same to be remanded to the orphans' court, and then from there began a series of appeals and writs of error from that court to the Court of Appeals, and from the Court of Appeals to this court, and by this means has delayed the just settlement of this estate nearly three years since her qualification—all these facts go to show the manifest purpose of plaintiff in error has been *delay*. This record shows the testator died March 25, 1897, leaving a personal estate of $36,000. He left no debts except those of his last illness, amounting only to $457.10. There were no complications in his estate, it being entirely in cash in bank, in United States registered bonds and a City of Richmond bond. It could easily and safely have been settled in thirty days after giving the formal notice for creditors, because there were no creditors, as the executrix well knew, as this record shows. But the executrix delayed the full fifteen months before making her *final settlement*, and in that settlement she set up her claim to the entire balance of the estate, and from that day to this has

litigated these defendants in every way possible on a claim held by the Court of Appeals to be without foundation. We therefore feel that this case comes clearly within the rule laid down by this honorable court on page 21 of Rules of the Supreme Court, rule 23, paragraph 2:

"In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding 10 per cent. in addition to interest shall be awarded upon the amount of the judgment."

It is, therefore, respectfully asked that the decree of the Court of Appeals be affirmed and we be allowed the 10 per cent. damages and interest under this rule.

Respectfully submitted.

F. P. B. Sands,

Wm. A. Milliken,

Solicitors for Defendants in Error.